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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1671

GLENN N. HEFNER, Individually And On Behalf Of
All Other Persons Similarly Situated,
Plaintiff-Appellant,

versus

NEW ORLEANS PUBLIC SERVICE, INC.,
THE CO-OPERATIVE STREET RAILWAY
EMPLOYEES' ASSN. OF NEW ORLEANS, and
THE AMALGAMATED TRANSIT UNION, DIVISION 1560,
Defendant-Appellees.

On Appeal from the United States Court of Appeals
for the Fifth Circuit

MOTION OF APPELLEE NEW ORLEANS PUBLIC SERVICE, INC. TO DISMISS

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New Orleans Public Service, Inc. (NOPSI), appellee herein, respectfully moves this Court pursuant to Rule 16, Rules of the Supreme Court of the United States, to dismiss the appeal from the decision of the United States Court of Appeals for the Fifth Circuit in *Hefner v. New Orleans Public Service, Inc.*, 605 F.2d 893 (5th Cir. 1979) on the ground that such appeal is not within this Court's jurisdiction.

STATEMENT OF THE CASE

The Court of Appeals in *Hefner v. New Orleans Public Service, Inc., supra,* affirmed the trial court's dismissal of appellant's complaint which challenged the consent order entered in an earlier class action lawsuit (*Faggen v. New Orleans Public Service, Inc.*, Civil Action No. 70-2946, United States District Court for the Eastern District of Louisiana). The Court correctly found that appellant's claim under Title 42, United States Code, section 2000-3, *et seq.* was time barred by the ninety day statutory limitations period and that his claim under Title 42, United States Code, section 1981 was barred by the equitable doctrine of laches. It is from this judgment that the appellant has filed a Jurisdictional Statement seeking to invoke the appellate jurisdiction of this honorable Court.

I. REASONS FOR DISMISSAL

In his Jurisdictional Statement the appellant relies on the statutory provisions of Title 28, United States

Code, section 1254 as his basis for appellate jurisdiction in this Court. However, section 1254 allows review of federal court adjudications by way of appeal only in those cases where the Court of Appeals has held a state statute to be invalid under the Constitution, treaties or law of the United States. 14 Wright, Miller & Cooper, *Federal Practice and Procedure: Jurisdiction* §4037 (1978).

In the case appealed herein no such action was taken by the Court of Appeals. The court based its decision solely on federal statutory interpretation and equitable principles and not on constitutional grounds.

There is no statutory authority conferring jurisdiction on this Court by way of appeal in cases of this nature. The decision below is reviewable, if at all, only by a properly presented petition for a writ of certiorari, 28 U.S.C. §1254(1). Accordingly, this improvidently taken appeal should be dismissed for lack of jurisdiction.

II. ALTERNATIVELY, THE JURISDICTIONAL STATEMENT FILED BY APPELLANT FAILS TO STATE SUFFICIENT GROUNDS FOR THE GRANTING OF A WRIT OF CERTIORARI

Alternatively, in the event that the Court treats the documents filed by the appellant as a petition for writ of certiorari, the appellee submits that the petition should be denied for the reasons hereinafter set forth. *See* 28 U.S.C. §2103.

In affirming the dismissal of the appellant's employment discrimination claims, the Court of Appeals specifically noted the unique facts upon which this suit is based.

The appellant, a caucasian transit operator employed by NOPSI, filed this action on June 25, 1976 against NOPSI, the Co-Operative Street Railway Employees Association (Co-Operative), and Co-Operative's successor as the collective bargaining representative of NOPSI's transit employees, the Amalgamated Transit Union (ATU), alleging unlawful discrimination on the basis of sex. He specifically challenged the provisions contained in section IiI of the consent order entered in *Faggen v. New Orleans Public Service, Inc., supra*, governing the revised pick list of white and black transit operators, as well as the collective bargaining agreement between NOPSI and the ATU incorporating such revised pick list.

Some two years prior to his lawsuit, on March 7, 1974, the appellant filed a formal charge of discrimination with the Equal Employment Opportunity Commission challenging the *Faggen* consent order. Thereafter, on May 22, 1974, the EEOC advised appellant by letter that his file had been administratively closed after the agency determined that it was powerless to investigate employment practices by a company acting in compliance with a court order. The EEOC letter recommended that the appellant oppose the *Faggen* consent order either through intervention in that action before the district court and/or appeal to the court of appeals. No further action was taken by either the appellant or the EEOC until approximately twenty-two months later when the EEOC sent the appellant a form letter at his request entitled "Notice of Right To Sue". This letter informed him that if he wished to file suit in federal court, he would have to do so within ninety days of receipt of the letter. Three months later the appellant filed this lawsuit.

In its written opinion the Court of Appeals below discussed the standard "two letter" procedure formerly utilized by the EEOC wherein that agency would first notify a complainant either that his charge had been dismissed, his file administratively closed, or that conciliation efforts had failed and that a second "right to sue" letter would be issued upon the request of the complainant or his attorney. The Court went on to discuss the uniqueness of the instant case and stated that "[i]n this case we are faced with a mysterious variant on the 'two tier' procedure". *Hefner v. New Orleans Public Service, Inc.*, 605 F.2d at 895. The court distinguished the facts of the instant case from the former two letter procedure and found that:

> This situation is thus entirely different from those in which the first letter communicates that efforts at conciliation have failed and indicates that further action by the EEOC is

> contemplated, (citation omitted) . . . or in which the first letter states only that efforts at conciliation have failed and that the complainant has the right to file suit in federal court (citation omitted)." *Hefner v. New Orleans Public Service, Inc.*, 605 F.2d at 895.

Having found the fact situation presented to be unique, the Court of Appeals examined the nature of the statements made in the first letter sent to appellant and determined that the letter adequately notified appellant of the running of the ninety day limitations period. In finding the section 1981 claim to be barred by laches, the Court further noted the appellant's awareness of the challenged consent order for almost two years prior to his filing suit and the prejudice to the other parties resulting from delayed attacks on such orders.

The decision below turns upon its own facts and will affect few other than the litigants presently before the Court. The legal issues decided are narrow because of the peculiar facts, and the recurrence of the questions presented is highly unlikely.

While various federal courts throughout the country have grappled with the issue of the commencement of the ninety day statutory limitations period under the standard "two letter" procedure formerly utilized by the EEOC, no court has been called on to

determine the effect of a letter such as the one sent to the appellant in this case wherein the Commission notifies the claimant that his file has been administratively closed due to the Commission's lack of jurisdiction and advises the claimant to pursue any further action in the United States District Court or Court of Appeals. Contrary to the argument of appellant in his Jurisdictional Statement, the decision of the Court of Appeals below in this case does not contravene the weight of judicial authority in this country.

Furthermore, any reliance by appellant on an EEOC regulation dealing with notification by the agency of a claimant's right to sue following the commission's failure to conciliate a claim is misplaced since, in the instant case, the agency dismissed appellant's claim for lack of jurisdiction prior to notifying NOPSI of the claim or attempting to conciliate such claim.

The appellant has failed to demonstrate the existence of any substantial federal question warranting further judicial review or to otherwise show any actual conflict of authorities. Further review by this honorable Court is unnecessary and, accordingly, the petition for a writ of certiorari should be DENIED.

CONCLUSION

For the reasons heretofore stated, appellee submits that this appeal is improvidently taken and should be

dismissed based on the Court's lack of jurisdiction. Alternatively, if appellant's Jurisdictional Statement is treated as a petition for writ of certiorari, appellee respectfully suggests that further review by this Court is unnecessary and that the petition should be denied. Appellant has failed to show the existence of a conflict of authorities over the issues presented or to demonstrate the existence of a substantial federal question warranting further judicial review.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that three printed copies of the foregoing Motion of Appellee New Orleans Public Service, Inc. To Dismiss have been served on Dale C. Wilks, 234 Loyola Avenue, Suite 815, New Orleans, Louisiana 70112 and Louis B. Merhig, 317 Magazine Street, New Orleans, Louisiana 70130, Counsel of record, by depositing the same in the United States mail, postage prepaid and properly addressed, this 18th day of March, 1980.

MICHAEL J. MOLONY, JR.